in the
Supreme Court
of the
United States

OCTOBER TERM, 1970

Supreme Court, U.S.
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No. 71-204

STATE OF FLORIDA,

Petitioner,

vs.

MALVIN ENGLANDER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

ROBERT L. SHEVIN
Attorney General for the State of Florida

RICHARD E. GERSTEIN
State Attorney of the Eleventh Judicial Circuit of Florida

JOHN B. ORR, JR.
Assistant State Attorney

HERBERT M. KLEIN
Assistant State Attorney

COUNSEL FOR PETITIONER

MIAMI REVIEW — 371-4853 — 377-3721

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Petitioner, State of Florida, respectfully prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of Florida, the Court of final Appellate jurisdiction within the State.

The following abbreviation will be used: TR for Transcript of Record on Certiorari before the Florida Supreme Court.

OPINIONS BELOW

On July 2, 1970, the Criminal Court of Record, in and for Dade County, Florida, entered its Order dismissing a Criminal Information filed against the Respondent, Malvin Englander. This Order is unreported, but is appended hereto as Appendix A.

On June 16, 1970, the District Court of Appeal of Florida, Third District, reversed the Order of the Trial Court and directed that the Information be reinstated. The Opinion of the District Court of Appeal is reported at 237 So.2d 193 and is appended hereto as Appendix B.

Respondent filed a Petition for Writ of Certiorari to the Supreme Court of the State of Florida. The Florida Supreme Court granted the Writ and reversed the Order of the District Court of Appeal, reinstating the Order of the Trial Court which dismissed the Information. The Opinion of the Supreme Court of Florida dated April 7, 1971, is reported at 246 So.2d 746 and is appended hereto as Appendix C.

Petitioner filed a timely Petition for Re-Hearing which was denied on May 12, 1971. The Order denying the Petition for Re-Hearing is appended hereto as Appendix D.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Court of Florida by invalidating, as a matter of law, a waiver of immunity signed by a public official testifying before a Grand Jury has created a "superclass" of citizens, that is public officials testifying before a Grand Jury, thereby depriving the ordinary citizen of equal protection of the law since such citizens must prove involuntariness in fact, rather than law, as a basis for holding such waiver invalid.

2. Where the Supreme Court of the United States has decided that a municipal code providing for job forfeiture by a public official who refuses to waive immunity and testify before a Grand Jury (or other inquisitorial body) is unconstitutional and the Supreme Court of Florida thereafter dismisses a Criminal Information against an elected public official, who, without subpoena, appeared before a Grand Jury, testified and waived immunity, which dismissal is based solely upon the existence of a local "job forfeiture" code, is the question of waiver of such Federal constitutional right (i.e. self-incrimination) governed by Federal standards and has the Supreme Court of Florida misinterpreted such standard so as to create a different standard in the State of Florida than exists in the other states, thereby calling into play the exercise of this Court's power to make uniform Federal standards governing Federal constitutional rights.

3. Whether the Supreme Court of Florida decided a Federal question of substance in a way not in accord with the applicable decisions of this Court when the Supreme Court of Florida held that a public official's testimony before a Grand Jury "under threat of loss of

official position" would result in a complete dismissal of the Information thereafter filed against such public official rather than having the public official assert the exclusionary rule in a State Court Criminal trial as to any incriminating evidence such public official may have been "forced" to give or any of the fruits of such involuntary testimony.

CONSTITUTIONAL PROVISIONS

Amendment V, United States Constitution:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

Amendment XIV, United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On April 18, 1969, an Indictment was filed in the Criminal Court of Record, in and for Dade County, Florida, charging the Respondent with Conspiracy to Solicit a Bribe and Soliciting a Bribe (TR 138 - 140).

On May 6, 1969, a Criminal Information based upon the aforesaid Indictment was filed charging the Respondent with the same crimes alleged in the Indictment (TR 139 - 143).

On May 27, 1969, the Respondent filed a Motion to dismiss the Information on the ground that Respondent had been immunized from prosecution by virtue of testimony given by him before the Dade County Grand Jury. The Motion was grounded upon Respondent's Fifth Amendment right against self-incrimination; Respondent asserting that although he was neither subpoenaed to appear before the Grand Jury, nor required to sign a waiver of immunity, which he did, the Respondent being an elected public official was under a compulsion to so appear, testify and waive immunity because of a job forfeiture provision contained in the Metropolitan Dade County Code (TR 144 - 150), Appendix E. The Florida Immunity Statute, Section 932.29, Florida Statutes, is appended hereto as Appendix F.

On July 2, 1969, the Trial Court entered an Order granting Respondent's Motion to dismiss on the basis set forth above and on the further ground that Respondent had not been given his "Miranda warnings" before the Grand Jury interrogation. The Trial Court dismissed the Information, ruling that the Respondent had been immunized from prosecution. A copy of the Trial Court's Order is appended hereto as Appendix A (TR 155 - 162).

Petitioner appealed the Order of the Trial Court to the District Court of Appeal, Third District, State of Florida, which Court reversed the Order of the Trial Court holding that the waiver of immunity signed by Respondent, as well as the testimony, was given freely and voluntarily,

the Respondent having stated to the Grand Jury that he was aware of the Code provision and was not in fear of that provision (for the entire colloquy that took place, see Argument 1 herein) and that the Trial Court was incorrect in holding such waiver invalid as a matter of law. A copy of this Opinion is appended hereto as Appendix B.

The Respondent filed a Petition for Writ of Certiorari before the Supreme Court of the State of Florida which granted such Writ and reversed the Order of the District Court of Appeal and reinstated the Order of the Trial Court dismissing the Information, holding that because of the job forfeiture provision relating to public officials who refuse to appear before Grand Jurys to testify, when called by such Grand Jury, such appearance by the Respondent and the signing of the waiver of immunity by Respondent was involuntary *as a matter of law*. This Opinion was based, almost in its entirety, upon this Court's decisions in the cases of *Gardner vs. Broderick*, 392 U.S. 273 (1968) and *Garrity vs. New Jersey*, 385 U.S. 493 (1967).

The question of the Federal standard to be applied to the signing of a waiver of immunity by a public official and his subsequent testimony before a Grand Jury (all without subpoena) was raised by both parties at all levels beginning with Respondent's initial Motion to dismiss before the Trial Court. The Federal standard applicable to the manner in which "tainted" testimony was to be applied (i.e. immunity from prosecution or the exclusionary rule) was also raised by Petitioner, and decided adversely to Petitioner by the Trial Court, the Trial Court decision being based upon the case of *Mattox vs. Carson*, 295 F. Supp. 1054, which case was subsequently reversed by the United States Court of Appeals, Fifth Circuit, in an opinion reported at 424 F.2d 202.

ARGUMENT

1. The Florida Supreme Court, by the opinion herein sought to be reviewed, created a "superclass" of citizen, a privileged class, that may *never*, as a matter of law, waive immunity—the public official; and a second class who has a little less constitutional right—the ordinary citizen, thereby denying to all of the citizens of the State of Florida equal protection of the law.

It is axiomatic that any citizen who claims involuntariness in waiving immunity or coercion or duress in testifying must show involuntariness or coercion by the facts of the case. *Miranda vs. State of Arizona*, 384 U.S. 436 (1966) and cases cited therein. Petitioner would respectfully suggest that the Supreme Court of Florida has held that as far as public officials are concerned, any such waiver or testimony is involuntary as a matter of law.

The following undisputed sequence took place in regard to the Respondent's testimony before the Grand Jury:

On April 9, 1969, an Assistant State Attorney called the Respondent advising him that the Dade County Grand Jury was conducting an investigation in a matter in which he was involved and further advising Respondent that the Grand Jury wished to extend an invitation for him to appear *if he desired to do so* (TR 91 - 92). The Respondent chose to appear before the Grand Jury on April 10, 1969, and the record reflects that the following took place, with the questions being asked by an Assistant State Attorney and the answers being given by Respondent:

"Q Mr. Englander, have you read this waiver of immunity you brought into the room with you?

A I have.

Q Do you understand its contents, sir?

A Yes.

Q You understand that by voluntarily executing it, you waive any right you might have from immunity to prosecution for anything you testify to here today and that anything you may say here which is incriminating can be used against you in a court of law?

A Yes.

Q Did you voluntarily sign this waiver, sir?

A Yes.

Q Did you sign it because of some fear of losing your official position as a City Councilman of the City of Miami Beach?

A No.

Q Did you sign it because of some fear that you might be prosecuted in the Metropolitan Court if you refuse to sign it?

A No. (TR 19-20)

* * *

Q (By Mr. Durant) For the record, did you understand from our telephone conversation of yesterday that you were to appear here only if you wanted to?

A (By Mr. Englander) Yes, sir.

Q That it was an invitation for you to appear if you wanted to?

A You made that clear to me, yes, and I again state that I am grateful for the opportunity, because I can appreciate that a lot of subsequent heartache can be avoided by coming at this state of proceedings and make revelations that are requested." (TR 21)

Thus, the voluntariness *in fact* of Respondent's appearance is beyond question and the ruling by the Supreme Court of the State of Florida denies equal protection of the law to the ordinary citizen who appears before an inquisitorial body or who answers questions which he later claims were coerced in that such ordinary citizen must prove involuntariness or coercion by the factual situation surrounding the signing of a waiver or the giving of such testimony.

In deciding Respondent's waiver and testimony was involuntary as a matter of law, the Supreme Court of Florida relied heavily upon the *Garrity* case, cited supra. The facts in *Garrity* were the complete opposite of the uncontradicted facts as set forth above. *Garrity* involved police officers who were required to either answer questions of the Attorney General or be removed from their official positions. Garrity was subsequently advised that

"If he refuses to answer, he would be removed from office." Page 618.

"The choice given to Petitioners was either to forfeit their jobs or to incriminate themselves." Page 618.

Nowhere in the instant matter was any such alternative or threat implied or expressed.

2. The question of an effective waiver of a Federal constitutional right, i.e. waiver of immunity and subsequent testimony, is governed by Federal standards and the Supreme Court of Florida applied such standard in the State of Florida in a different manner than has been applied by the United States Supreme Court.

The Supreme Court of Florida cited two United States Supreme Court cases as controlling in the instant matter; the *Gardner* and *Garrity* cases cited supra. The *Garrity* case did not involve the question of waiver of immunity and therefore this Court's decision in such case did not concern itself with the voluntariness or involuntariness of such waiver.

> "No immunity was granted as there was no immunity statute applicable in such cases." Page 617.

The Supreme Court of Florida's ruling that Respondent's waiver of immunity and subsequent testimony was involuntary as a matter of law was based solely upon the job forfeiture provision of the Dade County Code. The *Gardner* case cited supra involved the refusal by a New York policeman to waive immunity when subpoenaed to appear before a Grand Jury. Under a "job forfeiture Charter provision of the City of New York which was similar to the Charter provision involved herein" (language Supreme Court of Florida) the policeman was discharged from his public office for such refusal. The exact issue decided by this Court in *Gardner* was whether such job forfeiture Charter provision providing for forfeiture of official position upon refusal of an official to waive immunity and testify was enforceable. As stated in *Gardner* at Page 1915:

> "It is true that Garrity related to the attempted use of compelled testimony. It did not involve the precise question presented here: namely whether a State may discharge an officer for refusal to waive a right which the constitution guarantees to him."

This Court held that such job forfeiture provision was unenforceable and reversed Gardner's discharge stating in part at Page 1917:

> "Proper regard for the history and meaning of the privilege against self-incrimination applicable to the States . . . and for the decisions of this Court dictate the conclusion that the provision of the New York City Charter pursuant to which Petition was dismissed cannot stand."

Petitioner would respectfully suggest that the *Gardner* decision which set a Federal standard governing a constitutional right is equally applicable in Dade County, Florida as it is in New York City. Thus, the *Gardner* case, decided some ten months prior to Respondent's appearance before the Grand Jury, set the Federal standard that local job forfeiture provisions which attempt to override the privilege against self-incrimination, are invalid and unenforceable. Yet, the Florida Supreme Court invalidated Respondent's waiver of immunity and held he was immunized from prosecution as a matter of law based solely on the existence of such job forfeiture provision in the local code. Petitioner would respectfully suggest that the Florida Supreme Court misinterpreted the *Gardner* case and misapplied the Federal standard set forth therein.

3. The Supreme Court of Florida decided a Federal question not in accord with the applicable decisions of this

Court when it held that testimony adduced in violation of a defendant's right against self-incrimination was a bar to the State prosecuting a defendant rather than being a bar to the use of such evidence or any fruits thereof in a subsequent criminal trial under the exclusionary rule.

All of the decided cases of which your Petitioner has knowledge dealing with a defendant's claimed violation of his privilege against self-incrimination have held that any evidence gained from such coerced testimony or the testimony itself may be excluded as evidence in a criminal trial, but Petitioner knows of no case that has decided that if a defendant's Fifth Amendment right is violated, the State is completely barred from prosecuting, regardless of whether or not the tainted testimony or any fruits thereof are necessary for conviction. In the *Garrity* case, relied upon by the Florida Supreme Court, the appeal to this Court was decided upon the *admissibility* of such testimony in a criminal trial.

> "Over their objections, some of the answers given were used in subsequent proceedings for conspiracy." Page 620
>
> "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits the use in subsequent criminal proceedings of statements obtained under the threat of removal from office." Page 620.

Petitioner would respectfully suggest that the Florida Supreme Court convoluted the *Garrity* decision into a bar to the State from prosecuting Respondent. The *Garrity* case simply applied the exclusionary rule as to tainted testimony; and assuming arguendo that Respondent's testimony was coerced (because of an unenforceable job

forfeiture provision), the *Garrity* decision would not come into play until a later stage of the proceedings *if the prosecution later used the Respondent's testimony against him during the trial.* The Supreme Court of Florida decided that the State was prohibited from *filing* criminal charges against the public official regardless of whether such testimony was the basis for filing or would be used in a subsequent criminal proceeding.

It is clear that the relief for an involuntary waiver of a Federal constitutional right (self-incrimination) comes in the form of asserting the exclusionary rule in a State trial and does not render such defendant immune from prosecution. To this effect see *Counselman vs. Hitchcock*, 142 U.S. 585 (1892); *Murphy vs. Waterfrimt Commission of New York*, 378 U.S. 52 (1964); *Johnson vs. Zerbst*, 305 U.S. 458 (1938); *Gardner vs. Broderick*, cited supra; *Miranda vs. State of Arizona*, 384 U.S. 436 (1966) and cases cited therein.

Recapitulating, it is respectfully suggested that this Court should review the ruling of the Florida Supreme Court for the following reasons:

1. The facts are undisputed that the Respondent, a public official, voluntarily appeared before a Grand Jury and voluntarily signed a waiver of immunity and voluntarily testified and the Florida Supreme Court, by ruling that Respondent's testimony and waiver were invalid because they were involuntary as a matter of law, has created two classes of citizens, the ordinary citizen who appears before an inquisitorial body and a "superclass" of citizen — the public official — thereby denying to the ordinary citizen the equal protection of the law.

2. This Court decided much prior to the Respondent's appearance before the Grand Jury that a Municipal

Charter providing for forfeiture of official position for refusal to testify was unconstitutional and the Supreme Court of Florida, by its ruling subsequent to such case, holding that Respondent's testimony before the Grand Jury was invalid as a matter of law because of fear of job forfeiture under a local Code, has misapplied a Federal standard governing waiver of constitutional rights.

3. The rule of law as enunciated by this Court regarding coerced testimony taken in violation of a person's privilege against self-incrimination or any of the fruits thereof is that the same should be excluded from evidence in State criminal court trials, and the Florida Supreme Court, by its ruling has decided a Federal question of substance in a way not in accord with the applicable decisions of this Court by deciding that a defendant is immunized from prosecution once he makes a statement in violation of his Fifth Amendment right.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General for the State of Florida

RICHARD E. GERSTEIN
State Attorney for the Eleventh Judicial Circuit of Florida

By _____
JOHN B. ORR, JR.
Assistant State Attorney

_____
HERBERT M. KLEIN
Assistant State Attorney

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the State of Florida was mailed to Jepeway, Gassen & Jepeway and Frates, Fay, Floyd & Pearson, Attorneys for Respondent Malvin Englander, 619 Dade Federal Building, Miami, Florida 33131, this ____ day of August, 1971.

JOHN B. ORR, JR.
Assistant State Attorney

HERBERT M. KLEIN
Assistant State Attorney

APPENDIX

APPENDIX A

IN THE CRIMINAL COURT OF RECORD,
IN AND FOR DADE COUNTY, FLORIDA.

CASE NO. 69-3730

THE STATE OF FLORIDA

Plaintiff,

vs.

STANLEY JOEL LEVINE and MALVIN ENGLANDER,
Defendants.

Filed July 2, 1969

ORDER

THIS CAUSE came on for hearing on June 30, 1969 on the defendants' motion to dismiss, said motion being filed in the nature of a plea in abatement raising the question of immunity from prosecution, and the Court having heard the argument of counsel and considered the law applicable to the facts, finds as follows:

1. The defendants, and each of them, were charged by indictment resulting in a two-count information, the first count of which charged conspiracy to solicit a bribe and a second count of soliciting a bribe.

2. The defendant, STANLEY JOEL LEVINE appeared in the office of the State Attorney on April 8, 1969, signed a waiver of immunity and gave testimony

before an Assistant State Attorney concerning the subject of the charges laid in the indictment. Thereafter, the defendant, STANLEY JOEL LEVINE, was issued a subpoena on the 8th day of April, 1969, the same date on which he appeared before the Assistant State Attorney, commanding him to appear before the Dade County Grand Jury on April 10, 1969. On April 10, 1969 before the Dade County Grand Jury, the defendant, STANLEY JOEL LEVINE, signed a second waiver of immunity form and proceeded to testify before the Dade County Grand Jury concerning the matters and things which form the subject of the indictment and subsequent information. The two waivers of immunity and the Grand Jury subpoena were introduced without objection for purposes of the motion to dismiss as the defendant STANLEY JOEL LEVINE'S Exhibits A, B and C, respectively.

3. The defendant STANLEY JOEL LEVINE'S statement before the Assistant State Attorney was admitted for purposes of the motion as the defendant STANLEY JOEL LEVINE'S Exhibit D. The Court also reviewed the testimony of the defendant, STANLEY JOEL LEVINE, before the Dade County Grand Jury. The Court finds that neither in the office of the Assistant State Attorney nor before the Dade County Grand Jury was the defendant, STANLEY JOEL LEVINE, advised of his constitutional rights against self-incrimination as required by the Supreme Court of the United States in the case of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 1623. The Court further finds that the defendant, STANLEY JOEL LEVINE, was, prior to his interrogation by the State Attorney and his appearance before the Grand Jury, an attorney at law admitted to practice before the Bar of this State.

4. The Court finds that the defendant, MALVIN ENGLANDER, was, prior to his suspension from office by the Chief Executive, a duly elected member of the City Council of the City of Miami Beach, Dade County, Florida. The Court further finds that the defendant, MALVIN ENGLANDER, is an attorney at law admitted to practice before the Bar of this State since 1942.

5. This Court finds that the defendant, MALVIN ENGLANDER, was called to testify before the Dade County Grand Jury and appeared before this body on April 10, 1969, his appearance being the result of a telephone call from Assistant State Attorney, N. Joseph Durant.

6. This Court finds that the defendant, MALVIN ENGLANDER, did appear before the Dade County Grand Jury on April 10, 1969, and did execute a waiver of immunity and testified before that body concerning the matters and things which form the basis of the charges against him as set forth in the indictment and information. The waiver of immunity executed by the defendant, MALVIN ENGLANDER, was introduced without objection for purposes of the motion to dismiss as the defendant MALVIN ENGLANDER'S Exhibit A.

The contention of the defendants is that they are immune from prosecution by virtue of having been compelled to testify about an alleged violation of the Bribery Statutes (§ 838 F.S.), which section is encompassed by the provisions of F.S. § 932.29 as being one of the offenses contained within the Immunity Statute.

In order to invoke this privilege, both defendants testified at the hearing on the motion to dismiss.

The defendant, STANLEY JOEL LEVINE, testified that although he was a practicing attorney his practice had been limited to real estate matters and other "office practice" matters and that although he believed he understood the effect of a waiver of immunity, he later discovered that he was mistaken as to the law.

The defendant, MALVIN ENGLANDER, testified that he was aware of the following provisions of the Metropolitan Code of Dade County, Florida, which provisions have been introduced for the purposes of the motion as the defendant MALVIN ENGLANDER'S Exhibits B and C.

The following provisions of the Dade County Code are cited by the defendant, MALVIN ENGLANDER:

DADE COUNTY CODE — CHARTER

Section 802 Waiver of Immunity

> Any county or municipal officeholder or employee who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties or employment, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before the grand jury shall be removed from office or public employment by the appropriate authority, or upon suit by the State Attorney of this county.

DADE COUNTY CODE — ADMINISTRATION

Section 2-55 Penalty for violations

> Any person who wilfully violates any provision of this division shall be quilty of an of-

fense, triable in the metropolitan court, and shall upon conviction be punished by a fine not to exceed one thousand dollars, or by imprisonment in the county jail not to exceed twelve months, or both. (Ch.30255, § 23, Laws 1955; Ord.No. 57-16, §1,10-7-57).

The questions presented by the defendant are as follows:

I.

IS IT A PREREQUISITE TO THE SIGNING OF A WAIVER OF IMMUNITY BY A WITNESS APPEARING BEFORE THE STATE ATTORNEY OR THE GRAND JURY THAT SAID WITNESS BE ADVISED OF HIS CONSTITUTIONAL RIGHTS AGAINST SELF-INCRIMINATION BEFORE EXECUTING A WAIVER OF SUCH RIGHTS?

II.

IS THE FACT THAT BOTH DEFENDANTS ARE ATTORNEYS AT LAW AND ADMITTED TO PRACTICE BEFORE THE BAR OF THIS STATE SUFFICIENT IN AND OF ITSELF TO BE PRESUMPTIVE OF THEIR KNOWLEDGE OF THEIR RIGHTS AGAINST SELF-INCRIMINATION TO THE EXTENT THAT THEY NEED NOT BE WARNED OF THEIR CONSTITUTIONAL PRIVILEGES BEFORE SIGNING A WAIVER OF SUCH RIGHTS?

This Court answers the first question in the affirmative.

The State contends that the appearance of both defendants was voluntary. The testimony disclosed that the defendant, STANLEY JOEL LEVINE, appeared in the office of the State Attorney as a result of a telephone call from Assistant State Attorney John B. Orr and did appear on April 8, 1969. The document which the defendant, STANLEY JOEL LEVINE, signed on its face is contradictory to the facts as they evolved from the testimony. The form which the defendant, STANLEY JOEL LEVINE, signed on April 8, 1969 specifically states:

> "WAIVER OF IMMUNITY BY PERSON APPEARING VOLUNTARILY BEFORE THE STATE ATTORNEY OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY."
>
> "I, STANLEY JOEL LEVINE, voluntarily appearing of my own accord before the State Attorney of the Eleventh Judicial Circuit of Florida, in and for Dade County, and not at his request to appear, desire to discuss and testify in a certain matter pending before him, in which I am a witness, and do hereby waive any rights that I may have touching my immunity from prosecution in such matter."
>
> "I am appearing freely and voluntarily of my own will and accord, and I am thoroughly and completely conscious of all my rights to refuse to testify under the Constitution and Laws of this State, and, for the privilege of making this statement, waive all such rights and to any immunity whatsoever."

"I understand that I am permitted to have the advice of my attorney and to have an attorney present with me."

"I further agree that anything I may say before the aforesaid State Attorney may be used as evidence in any proceedings."

Both the defendant, STANLEY JOEL LEVINE, and the Assistant State Attorney agree that his appearance was at the request of the Assistant State Attorney. The form which the defendant signed states clearly that the defendant appeared "voluntarily . . . and not at his (the State Attorney's) request . . ."

The second waiver signed by the defendant, STANLEY JOEL LEVINE, before the Dade County Grand Jury states as follows:

"WAIVER OF IMMUNITY BY A WITNESS APPEARING AT THE REQUEST OF THE DADE COUNTY GRAND JURY"

"I, STANLEY JOEL LEVINE, having been requested by the Dade County Grand Jury to come before them and testify in a certain matter pending before them, do hereby waive any Constitutional rights that I may have touching my immunity from prosecution in such matter."

"I am appearing freely and voluntarily of my own will and accord, and I am thoroughly and completely conscious of all my rights to any immunity whatsoever."

> "I further agree that anything I may say before this Grand Jury may be used against me, as the case may be."

There is no contention by the State that the defendant, STANLEY JOEL LEVINE, was not subpoenaed for his appearance before the Dade County Grand Jury, yet the waiver he signed sets out that he is appearing freely and voluntarily of his own free will and accord. These circumstances are incompatible.

If one's appearance before an investigating body is commanded by a subpoena, his appearance cannot in any manner be held voluntary.

The defendant at the time he received the subpoena had two choices: the first being to honor it and appear; the second being to ignore it and risk the punishment for contempt.

The Supreme Court of the United States in Malloy v. Hogan, 378 U.S. 8, 84 S.Ct. 1493, states:

> "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement — the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty * * * for such silence."

In Spevack v. Klein, 87 S.Ct. 625, the Court defines "penalty" as used in its decision of Malloy v. Hogan, supra. In Spevack the Supreme Court said:

> "In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in Griffin v. State of California, 380-U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly'." (Emphasis supplied)

Clearly the defendant, STANLEY JOEL LEVINE, appeared before the Grand Jury not voluntarily and of his own free will and accord, as stated in the waiver, but rather under the compulsion of a subpoena and the prospect of being held in contempt had he chosen to ignore it.

The defendant, MALVIN ENGLANDER, according to the State's contention was "invited" to appear before the Dade County Grand Jury and it is the State's contention that he accepted the invitation and that he was asked about the provisions of the Charter of Metropolitan Dade County concerning the loss of his official position as well as the penalty provision and that the defendant, MALVIN ENGLANDER, freely and voluntarily, and knowing his rights, signed a waiver of immunity and testified.

The State contends that they did not request him to appear before the Grand Jury.

The defendant, MALVIN ENGLANDER, signed an identical waiver of immunity before the Dade County Grand Jury as did the defendant, STANLEY JOEL LEVINE. The waiver itself is a contradictory instrument since it sets out in its first paragraph that the defendant, "... having been requested by the Dade County Grand Jury to come before them and testify...", and then in the next paragraph setting out that the person appearing is doing so freely and voluntarily and of their own free will and accord.

With regard to the defendant, MALVIN ENGLANDER, the compulsion lies in the provisions of the Dade County Code and it is immaterial whether he appeared before the Grand Jury as the result of having been served with a subpoena or whether he appeared in response to a telephone call from a person authorized by law to command his appearance.

The ordinance which concerns the waiver of immunity by public officials and the penalty provision for failing to waive such immunity and testify is as compelling as a subpoena since the ordinance itself does not use the word subpoena but refers to any public official who is "called" to testify.

The question of voluntariness is a legal question for the Court to decide from the facts and not a question which can be resolved by an individual affixing his name to a piece of paper.

This question was previously decided by this Court in the case of State v. Dayton, et all, which was affirmed by the Third District Court of Appeal, 215 So.2d 87.

Having concluded that the appearance of both defendants before the Dade County Grand Jury was not voluntary, the question of the advisement of rights prior to the signing of any purported waiver must be explored.

The Supreme Court of the United States in Garrity v. State of New Jersey, 87 S.Ct. 616, states:

> "It is said that there was a 'waiver'. That, however, is a federal question for us to decide."

Since the full force and effect of the Fifth Amendment of the Constitution of the United States has been absorbed into the Fourteenth Amendment (Spevack v. Klein, supra), we must look to the federal courts to determine the prerequisite of a waiver and the necessity of a defendant or suspect, or any person upon whom an investigation has focused, to be fully apprised of their rights against self-incrimination before those rights are waived.

This Court relies on the case of Mattox v. Carson, 295 F.Supp.1054. This case rests on all fours with the case at bar.

In Mattox, the federal court states:

> "The sole question before this Court is whether or not the principles and safeguards announced in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct.1602, 16 L.Ed.2d 694 (1966), are applicable to a suspect and potential defendant who is required by a witness subpoena to appear before a State Grand Jury which is investigating the witness' alleged crimes where the State has an immunity statute which is applicable to the Grand Jury proceedings."

The United States District Court for the Middle District of Florida answered the question in the affirmative.

The second point raised by the State suggests that such warnings need not be given the defendants here since both are attorneys at law. The Supreme Court of

the United States in Spevack v. Klein, supra, disagrees with this contention.

In Spevack the Supreme Court of the United States said:

> "... As we recently stated in Miranda v. State of Arizona, 384 U.S. 436, 461, 86 S.Ct.1602, 1620, 16 L.Ed.2d 694, 'In this Court, the privilege (against self-incrimination) has consistently been accorded a liberal construction.' It is in that tradition that we overrule Cohen v. Hurley, 366 U.S. 117, 81 S.Ct.954. We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others. Lawyers are not excepted from the words 'No person * * * shall be compelled in any criminal case to be a witness against himself'; and we can imply no exception."

Likewise in Garrity, the Supreme Court of the United States further alluded to attorneys in the following language:

> "We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." (Emphasis supplied) Garrity v. New Jersey, supra

It is clear from the language of Spevack and Garrity that Miranda warnings apply to lawyers just as they do to anyone else. It is noteworthy that both the decisions in Garrity v. New Jersey, supra, and Spevack v. Klein, supra, were five to four decisions of the Supreme Court of the

United States, and although this Court is more impressed by the dissenting opinions of the four learned Justices above, it is nevertheless bound by the majority ruling of their five colleagues. The second question therefore must be answered in the negative.

This Court therefore finds as follows:

1. That the purported waiver of rights which each defendant signed prior to testifying before the Dade County Grand Jury is void as a matter of law in that neither waiver was signed freely and voluntarily.

2. That the subject matter of the investigation conducted by the Dade County Grand Jury concerns the subject matter of the indictment and information by which the defendants are charged in this Court.

3. That the defendants and each of them are immune from prosecution for the charges laid in the information inasmuch as said charges are encompassed within the provisions of § 932.29 F.S.

It is therefore,

ORDERED that the motions to dismiss be and the same are hereby

GRANTED.

DONE AND ORDERED in Chambers, at Miami Dade County, Florida, this 2nd day of July, A.D., 1969.

/s/ Paul Baker, Judge

PAUL BAKER, Judge
Criminal Court of Record

Filed and recorded in Criminal Court of record minutes as indicated hereon.

J. F. McCRACKEN, Clerk

By: Signature illegible

Deputy Clerk

APPENDIX B

[TITLE OMITTED]

The Criminal Court of Record for Dade County, Paul Baker, J., dismissed an information charging defendants with conspiracy to bribe and soliciting a bribe and the state appealed. The District Court of Appeal held that record revealed that a defendant intelligently executed waivers of immunity freely and voluntarily and without duress or coercion prior to his testimony before state attorney and grand jury, and that under evidence that provisions of metropolitan charter and ordinance that any municipal office holder or employee who, upon being called before a grand jury to testify, refuses to sign a waiver of immunity against subsequent criminal prosecution shall be removed from office or public employment were called to councilman's attention by specific questions and that he testified he voluntarily signed waiver without fear of losing his official position or of being prosecuted if he refused to sign, councilman's waiver of immunity from subsequent prosecution was intelligent and voluntary.

Order of dismissal reversed and cause remanded.

1. Criminal Law — 42

Record revealed that defendant, who had been requested by assistant state attorney to give statement concerning certain zoning matter and who had been subpoenaed to appear before county grand jury, intelligently executed waivers of immunity from subsequent prosecution freely and voluntarily and without duress or coercion. F. S.A. § 932.29.

2. Criminal Law — 42

Under evidence that provisions of metropolitan charter and ordinance that any municipal office holder or employee who, upon being called before grand jury, refuses to sign waiver of immunity from subsequent prosecution shall be removed from office or public employment had been called to city councilman's attention by specific questions prior to his testimony before county grand jury and that he testified he voluntarily signed waiver without fear of losing his official position or of being prosecuted if he refused to sign, city councilman intelligently and voluntarily waived his immunity to subsequent prosecution.

Earl Faircloth, Atty. Gen., and Richard E. Gerstein, State's Atty., and Joseph Durant, Asst. State's Atty., for appellant.

Cohen & Hogan, Miami Beach, Frates, Fay, Floyd & Pearson, Jepeway, Gassen & Jepeway, Miami, for appellees.

Before CHARLES CARROLL, HENDRY and SWANN, JJ.

PER CURIAM.

The Dade County Grand Jury indicted the defendants, Levine and Englander (appellees) for conspiracy to solicit a bribe and soliciting a bribe. An information based on the indictment was filed charging them with the same crimes alleged in the indictment. The trial court entered an order granting their motion to dismiss which held that

they had been immunized from prosecution for the crimes alleged in the information. The state has appealed from the order dismissing the information.

[1] The record shows that defendant Levine, an attorney in Dade County, was requested by an assistant state attorney to come in and give a statement concerning a certain zoning matter involving one of his clients. Levine agreed to do so. The following day, Levine appeared at the state attorney's office and prior to making a statement, signed a document entitled "Waiver of Immunity by Person Appearing Voluntarily Before the State Attorney". Levine testified before the assistant state attorney that he had read the waiver before he signed it, understood its contents and had voluntarily signed it.

On April 9, 1969, Levine was subpoenaed to appear before the Dade County Grand Jury on April 10, 1969. Before testifying, Levine signed another document entitled "Waiver of Immunity by a Witness Appearing at the Request of the Dade County Grand Jury". Levine testified before the Grand Jury that he had read the waiver; understood its contents based upon his legal experience; understood that he was waiving any immunity and that anything he said could be used against him; and that he freely and voluntarily signed the waiver without hesitation.

At the hearing on the motion to dismiss the information, Levine testified that he was never told he was a potential defendant prior to appearing before the state attorney or the Grand Jury. He further testified that he did not fully understand the waivers he signed and was never informed of his right of immunity from prosecution under § 932.29, Fla.Stat., F.S.A.

The record reveals that Levine intelligently executed the waivers of immunity freely and voluntarily and without duress or coercion and testified before the assistant state attorney and Grand Jury.

Having intelligently and voluntarily waived immun[redacted] the order of dismissal as to Stanley Joel Levine must [redacted] reversed. See Mattox v. Carson, 424 F.2d 202, (5th Cir. 1970) opinion filed March 25, 1970; McKown v. State, Fla.1951, 54 So.2d 54; State ex rel. Reynolds v. Newell, Fla.1958, 102 So.2d 613; State ex rel. Lowe v. Nelson, Fla. App.1967, 202 So.2d 232, aff'd, Fla.1968, 210 So.2d 197; State ex rel. Foster v. Hall, Fla.App.1970, 230 So.2d 722; State of Florida v. Chadroff, Fla.App.1970, 234 So.2d 412; filed April 20, 1970; and State Bar of Michigan v. Block, 175 N.W. 2d 769 (Mich.1970).

[2] The facts concerning Englander are different. Englander was a councilman in the City of Miami Beach, Florida. He received a telephone call from an assistant state attorney. At the hearing on the motion to dismiss Englander testified that the assistant state attorney was "calling me to appear before the Grand Jury the following day * * *." The assistant state attorney testified he called and said:

> "Mr. Englander, the Dade County Grand Jury is conducting an investigation into a matter in which you are involved.
>
> "They have asked me to extend an invitation to you to appear to tell your side of it, if you want to appear.
>
> "I told him that, 'You are not being subpoenaed, you are being invited to appear, and if you do not wish to do so, you do not have to do so.'

"He said that he did want to appear and tell his side of it and I said, 'Very well. The Grand Jury will be glad to hear from you at three.'"

Englander appeared without subpoena the following day before the Grand Jury and after being sworn was asked:

"Q. Mr. Englander, have you read this waiver of immunity you brought into the room with you?

"A. I have.

"Q. Do you understand its contents, sir?

"A. Yes.

"Q. You understand that by voluntarily executing it you waive any right you might have from immunity to prosecution for anything you testify to here today and that anything you may say here which is incriminating can be used against you in a court of law?

"A. Yes.

"Q. Did you voluntarily sign this waiver, sir?

"A. Yes.

"Q. Did you sign it because of some fear of losing your official position as a City Councilman of the City of Miami Beach?

"A. No.

"Q. Did you sign it because of some fear that you might be prosecuted in the Metropolitan Court if you refuse to sign it?

"A. No."

Subsequently, he thanked the Grand Jury and the assistant state attorney for inviting him to appear and later the following occurred before the Grand Jury.

"Q. For the record, did you understand from our telephone conversation of yesterday that you were to appear here only if you wanted to?

"A. Yes, sir.

"Q. That it was an invitation for you to appear if you wanted to?

"A. You made that clear to me, yes. And I again state that I am grateful for the opportunity, because I can appreciate that a lot of subsequent heartache can be avoided by coming in at this stage of the proceedings and making revelations that are requested."

At the hearing on the motion to dismiss the information Englander stated that he agreed to testify before the Grand Jury and to waive immunity because of the provisions of the Charter of Metropolitan Dade County, which provides:

"Section 8.02 Waiver of Immunity

Any county or municipal officeholder or employee who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties or employ-

> ment, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before the grand jury shall be removed from office or public employment by the appropriate authority, or upon suit by the State Attorney of this county."

and the provisions of the following ordinance:

> "Section 2-55 Penalty for Violations
>
> Any person who wilfully violates any provision of this division shall be guilty of an offense, triable in the metropolitan court, and shall upon conviction be punished by a fine not to exceed one thousand dollars, or by imprisonment in the county jail not to exceed twelve months, or both."

No argument has been raised on this appeal to the propriety or validity of the charter provision insofar as it applies to municipal officeholders.

At the hearing on the motion to dismiss Englander testified he feared he would lose his elected position and be subject to a fine under the terms of the charter and ordinance if he did not testify, or refused to sign a waiver of immunity before the Grand Jury.

In State v. Dayton, Fla.App. 1968, 215 So.2d 87, Dayton, a public official, appeared before the Dade County Grand Jury and, prior to signing a waiver of immunity, testified that he was not signing it out of fear of losing his official position. However, he was not questioned as

to any fear of possible prosecution in the Metropolitan Court. Based on the lack of that question, this Court ruled that Dayton's waiver was involuntary,. and said in part as follows:

> "The existence of the compulsive ordinance would not necessarily result in such immunity for an employee who signed a waiver of immunity. The waiver, if knowingly and voluntarily made, would be effective, and whether it is so made in a given instance is a question of fact. The record in this case would support a finding of voluntariness notwithstanding the ordinance relating to loss of position, but such is not the case as to the other ordinance which prescribed the criminal penalties. As to the latter, the trial court's ruling granting immunity to Dayton was correct and required under Garrity v. State of New Jersey, supra."

Here, the essential question is "was there an intelligent and voluntary waiver" by Englander. Here, contrary to Dayton, Englander was specifically asked questions at his voluntary appearance before the Grand Jury which were designed to show that he did not sign the waiver of immunity because of some fear he might lose his position as a city councilman of Miami Beach or because he might be prosecuted in the Metropolitan Court of Dade County if he refused to sign the waiver.

The "compulsion" claimed here is that Englander was compelled by the charter and the ordinance to choose "between the rock and the whirlpool," and that he was compelled to testify before the Grand Jury and to waive im-

munity. The evidence shows that the provisions of the Metropolitan charter and the ordinance were called to his attention by specific questions and that he testified he voluntarily signed the waiver without fear of losing his official position or of being prosecuted if he refused to sign.

We find no duress, coercion or compulsion and the evidence shows that there was an intelligent and voluntary waiver of immunity and that Englander admitted he was under no fear and that he was not compelled to appear, testify or execute the waiver of immunity under threat or penalty of the ordinance and the charter provision.

The order of dismissal as to each appellee is reversed and the cause remanded for further action consistent herewith.

APPENDIX C

[TITLE OMITTED]

City councilman filed petition for writ of certiorari to review decision of the District Court of Appeal, Third District, 237 So.2d 193, reversing and remanding order of the Criminal Court of Record for Dade County, Paul Baker, J., dismissing an information charging him with conspiracy to bribe and soliciting a bribe. The Supreme Court, Boyd, J., held that county charter provision for removal from office of county and municipal officials who refuse to waive immunity and testify before grand juries rendered councilman's waiver of immunity executed at time he testified before grand jury involuntary and, therefore, councilman was immunized from prosecution on bribery charges about which he testified before grand jury.

Decision of District Court quashed and cause remanded with instructions.

1. Grand Jury — 36

City councilman's mistaken belief that he was subject to a criminal penalty if he failed to testify before grand jury did not constitute basis for invalidating his waiver of immunity from prosecution for testimony given before grand jury. Laws 1955, c. 30255.

2. Criminal Law — 42

In view of county charter provision for removal from office of county and municipal officials who refuse to waive immunity and testify before grand juries, city councilman's waiver of immunity which he made at time

he testified before grand jury was involuntary and, therefore, under statute, city councilman was immunized from prosecution on bribery charges about which he testified before grand jury. F.S. A. 932.29.

3. Criminal Law — 641(2)

Requirement that an accused be warned of his rights to remain silent and to counsel relates to custodial interrogations and is not applicable to witnesses before grand jury.

Louis M. Jepeway, Jr., of Jepeway, Gassen & Jepeway, and Frates, Fay, Floyd & Pearson, Miami, for petitioner.

Robert L. Shevin, Atty. Gen., Richard E. Gerstein, State's Atty. and Joseph Durant, Asst. State's Atty., for respondent.

BOYD, Justice.

This cause is before us on petition for writ of certiorari to review the decision of the District Court of Appeal, Third District, reported at 237 So.2d 193. The decision sought to be reviewed conflicts with Davis v. State, 233 So.2d 641 (Fla.App. 2d 1970).

The Dade County Grand Jury indicted Stanley Joel Levine and Malvin Englander for conspiracy to solicit a bribe and soliciting a bribe. Subsequently an Information based on the indictment was filed charging the same crimes alleged in the indictment. The trial court entered

an order granting defendant's motion to dismiss on the grounds that they had been immunized from prosecution for the crimes alleged in the Information. The State appealed and the District Court, in the decision herein sought to be reviewed, reversed the order of dismissal as to each defendant and remanded the cause for further proceedings.

The petition of Stanley Joel Levine for writ of certiorari was dismissed sua sponte by this Court because not filed within thirty (30) days from the rendition of the decision sought to be reviewed.[1] The petition presently under consideration is concerned solely with that portion of the District Court's opinion which reverses the dismissal of the Information against Malvin Englander.

Petitioner Englander was, prior to his suspension from office by the Chief Executive, a duly elected member of the City Council of the City of Miami Beach, Dade County, Florida, and an attorney at law admitted to practice before the Bar of this State since 1942. Englander testified that he received a telephone call from the Assistant State Attorney to appear before the Grand Jury the following day. The Assistant State Attorney testified that he extended an "invitation" to Englander to appear and tell his side of the story, if he wanted to. Englander was not subpoenaed but he did appear before the Grand Jury on April 10, 1969. The trial court found that Englander "was called to testify before the Dade County Grand Jury * * * his appearance being the result of a telephone call from the Assistant State Attorney * * *."

Petitioner Englander, on appearance before the Grand Jury, after being sworn, was asked:

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[1] Levine v. State, 240 So.2d 814 (Fla. 1970).

"Q. Mr. Englander, have you read this waiver of immunity you brought into the room with you?

"A. I have.

"Q. Do you understand its contents, sir?

"A. Yes.

"Q. You understand that by voluntarily executing it you waive any right you might have from immunity to prosecution for anything you testify to here today and that anything you may say here which is incriminating can be used against you in a court of law?

"A. Yes.

"Q. Did you voluntarily sign this waiver, sir?

"A. Yes.

"Q. Did you sign it because of some fear of losing your official position as a City Councilman of the City of Miami Beach?

"A. No.

"Q. Did you sign it because of some fear that you might be prosecuted in the Metropolitan Court if you refuse to sign it?

"A. No."

The trial court, on motion to dismiss the information for bribery against Englander, held that the waiver of immunity signed by Englander was invalid because not freely and voluntarily made due to the officeforfeiture

provision § 8.02 of the Charter of Metropolitan Dade County, which provided as follows:

> "Any county or municipal officeholder or employee who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties or employment, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before the grand jury shall be removed from office or public employment by the appropriate authority, or upon suit by the State Attorney of this county."

The trial court and the District Court of Appeal incorrectly considered the following code provision, which relates only to county officials and employees:

> "Section 2-55 Penalty for Violations
>
> "Any person who wilfully violates any provision of this division shall be guilty of an offense, triable in the metropolitan court, and shall upon conviction be punished by a fine not to exceed one thousand dollars, or by imprisonment in the county jail not to exceed twelve months, or both."

The District Court reversed the order of dismissal and held that petitioner Englander could and did effectively and voluntarily waive his right of immunity from prosecution under Florida Statutes § 932.29, F.S.A. This decision conflicts with the Davis case, supra, wherein the

decision of the United States Supreme Court in Garrity v. New Jersey[2] is discussed as follows:

> "Garrity v. New Jersey * * * holds that a state cannot compel a public employee to waive Fifth Amendment rights at the cost of his job if he refuse. Therefore, a coerced waiver is invalid."

In Garrity, the United States Supreme Court held that statements made by policemen under threat of removal from office, were not voluntary and could not be used in subsequent criminal prosecutions against the policemen. The Court in Garrity stated:[3]

> "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent.
>
> * * *
>
> "Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other." (e.s.)

Subsequently, in the case of Gardner v. Broderick[4] the United States Supreme Court held invalid a job forfeiture charter provision of the City of New York which was similar to the charter provision involved herein. In Gardner, the Court stated:[5]

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[2] 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967).

[3] Id. at 497, 498, 87 S.Ct. at 618, 619.

[4] 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968).

[5] Id. at 279, 88 S.Ct. at 1916.

> "In any event, the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment."

As a result of the holding in the Gardner case, the County conceded[6] the unconstitutionality of Section 2-51, Code of Metropolitan Dade County,[7] relating to forfeiture of office by any person in the county service who refused to testify or waive immunity for self-incrimination and that provision was repealed July 23, 1969.[8] Section 2-51 of the Code, like Section 2-55, supra, were not applicable to petitioner in any event, although there was confusion about this in the proceedings below.

Section 8.02 of the Charter was repealed by vote of the people on November 5, 1969. This change occurred after the proceedings below. Petitioner Englander's appearance before the Grand Jury was in April of 1969, at a time when the forfeiture provision was still in effect.

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[6]Sellers v. Culbertson, 224 So.2d 808 (Fla. App.3rd 1969).

[7]Section 2-51: "If any person in the county service shall willfully refuse or fail to appear before any court or judge, any legislative committee or any officer, board or body authorized by law to conduct any hearing or inquiry, or having appeared shall refuse to testify or answer any question relating thereto on the ground that his testimony or answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any matter about which he may be asked to testify at any such hearing or inquiry, or if any such person shall refuse to answer any questions concerning the particular branch of the county service in which such person is employed, which may be asked him by the head of his department or by any other person authorized by the County Commissioners or by another elected official, as the case may be, to ask any such question, he shall forfeit his office or position and shall not be eligible thereafter for appointment to any position in the county service."

[8]Dade County Ord. No. 69-48 § 1 (July 23, 1969).

The criminal penalty provision 2-55 of the County Code, set out above, related only to violations of Division 2 of the Code,[9] which division includes Section 2-51 of the Code prohibiting county officials and county employees from refusing to testify before grand juries or from waiving immunity. Because petitioner was an elected city councilman of Miami Beach, the criminal penalty provisions relating to county officials and employees did not relate to him and he was wholly exempt from those provisions. Therefore the only compulsion to which petitioner was subjected was the threat of the loss of his elective office as a Miami Beach Councilman.

[1] Petitioner was questioned by the State Attorney before the Dade County Grand Jury as to possible criminal prosecution should he fail to testify and later, at the hearing on motion to dismiss, stated that his waiver was executed out of fear of criminal prosecution as well as removal from office. His mistaken belief, shared by the State and courts below, that he was subject to a criminal penalty, does not constitute a basis for invalidating his waiver of immunity.

[2] The question presented is whether § 8.02 of the Charter, providing for removal from office of county and municipal officials who refuse to waive immunity and testify before grand juries, renders petitioner's waiver of immunity involuntary. Applying the federal standard set out in the Garrity and Gardner decisions, supra, we hold that the waiver was involuntary.

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[9] "Section 2-54. Applicability of provisions. This division shall apply only to that part of the county service defined herein as the classified service. (Ch. 30255, § 20, Laws 1955)."

Because the forfeiture provision applied to Englander at the time of his appearance before the Grand Jury, he was caught "between the rock and the whirlpool" as stated in Garrity, and could not voluntarily waive immunity from prosecution under Florida Statutes § 932.29. The threat of loss of office dictated the involuntary nature of the waiver he signed.

Florida Statutes § 932.29, F.S.A., as it existed at the time of petitioner's appearance before the Grand Jury, provided in pertinent part as follows:[10]

> "No person shall be excused from attending and testifying * * * upon any investigation, * * * for a violation of any of the statutes of this state against bribery, * * upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify * * * and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding."

Under the foregoing statute, petitioner is immunized from prosecution on the bribery charges about which he testified before the Grand Jury in April of 1969. His testimony was "required of him" as specified by § 932.29.

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[10]Laws of Florida, Ch. 7858, § 1 (June 9, 1919). This act subsequently was amended effective October 1, 1969, Laws of Florida, Ch. 69-316, § 1.

Under the Charter provision, set out above, he was compelled to testify or suffer forfeiture of office.

[3] Petitioner has also raised the issue of "Miranda warnings" which were not given him at the time of his waiver of immunity and testimony. In State ex rel. Lowe v. Nelson,[11] this Court adopted the opinion of the District Court of Appeal, First District,[12] holding that the decision of Miranda v. State of Arizona,[13] relates to custodial interrogations and is not applicable to witnesses before the Grand Jury.

Accordingly, the decision of the District Court is quashed and the cause remanded with instructions to reinstate the order of the trial court dismissing the Information as to Malvin Englander.

It is so ordered.

ROBERTS, C. J., and ERVIN, CARLTON, ADKINS, McCAIN and DEKLE, JJ., concur.

---

[11]210 So.2d 197 (Fla.1968).

[12]202 So.2d 232 (Fla.App. 1st 1967).

[13]384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

APPENDIX D

[TITLE OMITTED]

On consideration of Petition for Rehearing filed by Attorneys for Respondent,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

ROBERTS, C.J., ERVIN, CARLTON, ADKINS, BOYD, McCAIN and DEKLE, JJ., concur

A TRUE COPY,

TEST:
/s/ Sid J. White
SID J. WHITE
CLERK SUPREME COURT

(THE MANDATE IN THIS CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT)

APPENDIX E

DADE COUNTY CODE — CHARTER

Section 8.02 Waiver of Immunity.

Any county or municipal officeholder or employee who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties or employment, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before the grand jury shall be removed from office or public employment by the appropriate authority, or upon suit by the State Attorney of this county.

APPENDIX F

FLORIDA IMMUNITY STATUTE

Section 932.29, Florida Statutes

Same; person not excused from testifying in certain prosecutions on ground testimony might incriminate him; immunity from prosecution. — No person shall be excused from attending and testifying, or producing any book, paper or other document before any court upon any investigation, proceeding or trial, for a violation of any of the criminal statutes of this state upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding. This section shall not apply to any person giving any testimony or producing any book, paper or other document unless such person does so upon the demand of the prosecuting attorney having jurisdiction to prosecute for the violation of the criminal statute involved upon the investigation, proceeding or trial at which the testimony is given or the documentary evidence produced.

SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-204

STATE OF FLORIDA,

Petitioner,

vs.

MALVIN ENGLANDER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Florida

BRIEF FOR RESPONDENT IN OPPOSITION

JOSEPH GASSEN
JEPEWAY, GASSEN & JEPEWAY
619 Dade Federal Building
Miami, Florida 33131
and
FRATES, FLOYD, PEARSON & STEWART
12th Floor, Concord Building
Miami, Florida

MIAMI REVIEW — 371-4853 — 377-3721

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in the Supreme Court of the United States

OCTOBER TERM, 1970

NO. 71-204

STATE OF FLORIDA,

Petitioner,

vs.

MALVIN ENGLANDER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Florida

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

On July 2, 1969, the Criminal Court of Record, in and for Dade County, Florida, entered its Order dismissing a Criminal Information filed against the Respondent,

MALVIN ENGLANDER, a duly elected member of the City Council of the City of Miami Beach, Dade County, Florida. The Court ruled that the Respondent's purported waiver of rights was void in that it was not signed freely and voluntarily, but rather, it was signed by the Respondent because of the provisions of Sec. 8.02 of the Charter of Metropolitan Dade County, which provided that if he, as a municipal officeholder, having been called to appear before the Dade County Grand Jury, refused to appear and waive immunity, he would be removed from office (App. E of Petition). The Court further ruled that since the waiver of immunity was involuntary and since the Respondent testified concerning matters encompassed within the provisions of the Immunity Statute 932.29 (App. F of Petition), the Respondent was immunized from prosecution (App. A of Petition).

On June 16, 1970, the District Court of Appeal of Florida, Third District, reversed the Order of the Trial Court and directed that the Information be reinstated. The Opinion of the District Court of Appeal is reported at 237 So.2d 193 (App. B of Petition).

On April 7, 1971, the Supreme Court of the State of Florida granted the Respondent's Petition for Writ of Certiorari, reversed the Order of the District Court of Appeal, and reinstated the Order of the Trial Court dismissing the Information. The opinion of the Supreme Court of the State of Florida is reported at 246 So.2d 746 (App. C of Petition).

Petitioner's Petition for Re-Hearing was denied on May 12, 1971 (App. D of Petition).

JURISDICTION

The Petitioner seeks to invoke the jurisdiction of this Court under Title 28 United States Code, Section 1257 (3). However, the Petitioner nowhere draws in question the validity of a treaty or statute of the United States or the validity of a statute of the State of Florida on the ground of its being repugnant to the Constitution, treaties or laws of the United States (It would certainly be an anomalous situation for the Petitioner to urge that one of its own statutes is unconstitutional!). Nor does the Petitioner assert any title, right, privilege or immunity specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. There simply is no title, right, privilege or immunity which the Petitioner, the prosecuting authority, can claim. Those are for individuals, not for a state. And, the Petitioner has cited absolutely nothing to the contrary to uphold its claim that the jurisdiction of this Court should be invoked in this matter.

Furthermore, the Petitioner has not complied with Rule 19 of the Rules of the Supreme Court of the United States, in that the Petition for Writ of Certiorari does not set forth any special and important reason for the granting of the Petition; nor does it contend that the Supreme Court of the State of Florida has decided a Federal question of substance not heretofore determined by this Court; nor does it contend that the Supreme Court of the State of Florida has decided a Federal question of substance in a way probably not in accord with applicable decisions of this Court.

QUESTION PRESENTED

Whether the Supreme Court of the State of Florida correctly held that the Respondent, MALVIN ENGLANDER, a Councilman of the City of Miami Beach, Dade County, Florida, (a municipal officeholder governed by Section 8.02 of the Metropolitan Dade County, Florida, Charter) was immunized from prosecution by reason of his testimony before the Dade County Grand Jury, which was made under compulsion and in violation of his Constitutional right against self-incrimination, because he was forced to either waive immunity and testify, or suffer the loss of his public office.

CONSTITUTIONAL PROVISIONS, STATUTE, AND METROPOLITAN DADE COUNTY CHARTER PROVISION INVOLVED

The pertinent portions of Amendments V and XIV to the Constitution of the United States are set forth in the Petition at Page 4. The Florida Immunity Statute is set forth in the Petition as Appendix F. The Dade County Charter provision requiring municipal officeholders who are called before a Grand Jury to either sign a waiver of immunity or be removed from office is set forth in the Petition as Appendix E.

STATEMENT OF THE CASE

The Petitioner's Statement of the Case is basically correct. However, there are some inaccuracies which the Respondent feels should be rectified.

On April 9, 1969, the Respondent, MALVIN ENGLANDER, a City Councilman of the City of Miami Beach, Dade County, Florida, was called, by the Assistant State Attorney, to appear before the Dade County Grand Jury (Tr. 10). The Section of the Metropolitan Dade County Charter which concerns the waiver of immunity by public officials and the penalty provision for failing to waive such immunity and testify is as compelling as a subpoena since the Section itself does not use the word *subpoena* but refers to any public official who is *called* to testify (App. E of Petition). Thus, Petitioner's assertion that Respondent was not subpoenaed to appear before the Grand Jury (Page 5 of Petition) is meaningless. Additionally, Petitioner's statement that Respondent did not assert in his Motion to Dismiss that he was not required to sign a waiver of immunity (Page 5 of Petition) is inaccurate. The whole point is that Respondent was required to appear and testify before the Grand Jury and waive immunity because of the job forfeiture provision contained in the Metropolitan Dade County Charter, Section 8.02 (App. E of Petition), and this was set forth in Respondent's Motion to Dismiss in the Trial Court (Tr. 144-147). At the time of his appearance before the Dade County Grand Jury, the Respondent was aware of the provisions of Section 8.02 of the Metropolitan Dade County Charter, which required County and City officials within Dade County to waive immunity, and testify, when called before the Grand Jury, or forfeit their positions (Tr. 13-14). The Respondent, MALVIN ENGLANDER, appeared and testified before the Grand Jury, and signed a waiver of immunity, because he knew that if he did not do so, he would lose his position as City Councilman of the City of Miami Beach, Dade County, Florida (Tr. 20-22, 26). The Trial Court, in ruling that the Respondent's waiver was

involuntary, and thus that he was immunized from prosecution, followed **Garrity v. New Jersey**, 385 U.S. 493 (1967) and the Florida Immunity Statute, Section 932.29 of the Florida Statutes (App. A of Petition). The Supreme Court of the State of Florida, in reinstating the Trial Court's Order, also relied upon **Garrity v. New Jersey**, supra, and the Florida Immunity Statute.

ARGUMENT

It is clear that neither a State nor a County can use the threat of discharge to compel a public official or an employee to waive his Fifth Amendment right. **Garrity v. New Jersey**, 385 U.S. 493 (1967). When a public official is placed in such a position, he is forced to make "a choice between the rock and the whirlpool." In **Garrity v. New Jersey**, supra, this Court stated that:

> "Where the choice is 'between the rock and the whirlpool,' duress is **inherent** in deciding to 'waive' one or the other." (Emphasis added)

This Court concluded that:

> "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice . . . is 'likely to exert such pressure upon the individual as to disable him from making a free and rational choice.' We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions."

The purported waiver by the Respondent could not possibly have been voluntary. The record amply reflects that the Respondent was given the choice "between the rock and the whirlpool". Metropolitan Dade County, Florida, had the aforementioned waiver of immunity provision in its Charter (App. E of Petition), which provided that if the Respondent, a City Coucilman of the City of Miami Beach, Dade County, Florida, having been called before a Grand Jury to testify, refused to sign a waiver of immunity and testify, he would be removed from office. The threat of loss of office dictated the involuntary nature of the waiver which the Respondent signed. When testifying at the hearing on his Motion to Dismiss, the Respondent stated that he agreed to sign a waiver of immunity and testify before the Grand Jury because he was aware of the existence of the aforementioned Charter provision (Tr. 13-14) and he knew that if he did not waive immunity and testify before the Grand Jury he would lose his public office (Tr. 20-22, 26).

Additionally, as the Trial Court noted (Tr. 159), the purported waiver, itself, is a contradictory instrument since it sets out in its first paragraph that the Respondent, "... having been requested by the Dade County Grand Jury to come before them and testify ...," and in the next paragraph sets out that the Respondent appeared before the Grand Jury freely and voluntarily and of his own free will and accord.

Moreover, it is immaterial whether the Respondent appeared before the Dade County Grand Jury as a result of having been served with a subpoena or whether he appeared in response to a telephone call form a person authorized by law to command his appearance. The Metro-

politan Dade County Charter provision concerning the waiver of immunity by public officials and the penalty provision for failing to waive such immunity and testify (App. E of Petition) is as compelling as a subpoena since the Charter provision itself does not use the word "subpoena" but refers to any public official who is *called* to testify. The Petitioner cannot do indirectly what it cannot do directly.

Accordingly, the Supreme Court of the State of Florida was correct in ruling that, since the waiver was involuntary, the Respondent is immune from prosecution for the charges laid in the Information against him since the said charges are encompassed within the provisions of Section 932.29 of the Florida Statutes (App. F of the Petition), Florida's Immunity Statute.

The Supreme Court of the State of Florida, in its decision, has not created a "super-class" of citizens. Rather, what it has done, is to properly follow this Court's ruling in **Garrity v. New Jersey**, supra, that public officials and public employees are entitled to the same Constitutional rights as are all other citizens, and are not second-class citizens. As this Court said in **Garrity**:

> "We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights."

Petitioner's contention that, because Section 8.02 of the Dade County Charter, the waiver of immunity and job forfeiture Section (App. E of Petition) was of doubtful Constitutionality, the Respondent's waiver was voluntary, is totally untenable. The Petitioner first utilizes

a law of one of its political subdivisions to coerce a waiver of Constitutional rights, and then it turns around and asserts that, since the law might have been unconstitutional, it was unenforceable, and Respondent's waiver was voluntary. The Petitioner cannot have it both ways. The point in question is not the Constitutionality of the Charter provision, but, rather, the voluntariness of Respondent's waiver. As this Court stated, in **Garrity v. New Jersey**, supra, the importance of the forfeiture of office provision was its effect on the voluntariness of the waiver of the right against self-incrimination. As this Court stated, at p. 496:

> "... The only bearing it (the New Jersey forfeiture-of-office statute) had was whether, **valid or not,** the fear of being discharged under it for refusal to answer on the one hand and the fear of self-incrimination on the other, was 'a choice between the rock and the whirlpool' which made the statements products of coercion in violation of the Fourteenth Amendment.
>
> * * *
>
> "We agree with the New Jersey Supreme Court that the forfeiture-of-office statute is relevant here only for the bearing it has on the voluntary character of the statements used to convict petitioners in their criminal prosecutions." (Emphasis and parenthesis supplied.)

Additionally, it is totally unconstitutional for police officers to threaten physical harm to a suspect if he does not confess to a crime. However, it would be absurd to contend that a confession obtained under those circumstances was voluntary, because the actions of the police

officers were unconstitutional and unenforceable. In **Spevack v. Klein**, 385 U.S. 511, this Court ruled that the Fifth Amendment right was available to attorneys in Bar disciplinary proceedings. If, in a Bar disciplinary proceeding, the Bar required an attorney to waive his right against self-incrimination, or be disbarred, could anyone seriously contend that the waiver was voluntary? As this Court so properly stated in **Gardner v. Broderick**, 392 U.S. 273 (1968), at p. 279:

> "... **Petitioner could not have assumed — and certainly he was not required to assume — that he was being asked to do an idle act of no legal effect.** In any event, the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of an employment . . ." (Emphasis added)

Finally, Petitioner is mistaken in its contention that the Supreme Court of the State of Florida ruled that the Respondent was immunized from prosecution solely because the Respondent's waiver was involuntary and coerced. Respondent is immunized from prosecution because, after having been forced to sign a waiver of immunity, he was required to testify before the Grand Jury concerning the charges set out in the Information filed against him, and the said charges are encompassed within the provisions of Section 932.29 of the Florida Statutes (App. F of Petition), the Florida Immunity Statute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOSEPH GASSEN,
Counsel for Respondent,
MALVIN ENGLANDER

JEPEWAY, GASSEN AND JEPEWAY
619 Dade Federal Building
Miami, Florida 33131

FRATES, FLOYD, PEARSON AND STEWART
12 Floor Concord Building
66 West Flagler Street
Miami, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief for Respondent in Opposition, on Petition for a Writ of Certiorari to the Supreme Court of the State of Florida, was mailed this _____ day of August, 1971, to the following:

HON. ROBERT L. SHEVIN,
Attorney General for the State of Florida,
Tallahassee, Florida

HON. RICHARD E. GERSTEIN
State Attorney,
1351 N. W. 12th Street
Miami, Florida

HON. JOHN B. ORR, JR.,
Assistant State Attorney,
1351 N. W. 12th Street
Miami, Florida

HON. HERBERT M. KLEIN,
Assistant State Attorney,
1351 N. W. 12th Street
Miami, Florida.

_____
Of Counsel